
2007 Wis Eth Bd 14
IMPROPER USE OF OFFICE, LOBBYING LAW

A legislator may appear in a lobbying principal's video for employees and directors of the organization's members on the importance of talking about how the member institutions serve members and communities but the lobbying organization should not disseminate the video proximate to an election in which the legislator is or is likely to be a candidate.

Facts

- ¶1 This opinion is based upon these understandings:
- a. You write on behalf of an organization that is a registered lobbying principal.
 - b. The organization is proposing to make a video for employees and directors of your organization's members on the importance of their talking to others about how their institutions serve members and communities.
 - c. The organization will make the video available to its member institutions.
 - d. The organization would like to ask a legislator to appear in the video to talk about his family's experience being helped by a member institution.
 - e. The organization would pay no compensation or other consideration to the legislator.

Question

- ¶2 The Ethics Board understands your question to be:
- May a legislator appear in the organization's proposed video?

Discussion

- ¶3 A legislator may appear in the organization's video, but the organization should not disseminate the video proximate to an election in which the legislator is or is likely to be a candidate.

Ethics Code's application

¶4 Reduced to its elements, §19.45 (2), *Wisconsin Statutes*, provides, in pertinent part:

No state public official
May use public position or office
To obtain anything of substantial value
For the private benefit of himself or herself or his or her immediate family, or
for an organization with which he or she is associated.¹

¶5 A legislator is a state public official.²

¶6 An official's accepting an item or service offered because the individual holds a government position is a use of office.³

¶7 Appearing in a video that will be shown to a relatively small audience of employees and directors of the organization's member institutions and talking about one's experience with those institutions does not appear to be something of substantial personal value to the legislator.⁴

¶8 Because your organization's communication of its message to employees and directors conveys no private benefit to the legislator, §19.45 (2), *Wisconsin Statutes*, does not prohibit the organization's selection of the legislator as a participant in the organization's video message.⁵ Nor does the legislator's

¹ Section 19.45 (2), *Wisconsin Statutes*, provides:

19.45 (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. * * * *

² Section 19.42 (13) (c) and (14), *Wisconsin Statutes*.

³ See, e.g., 2006 Wis Eth Bd 04, ¶61995 Wis Eth Bd 5, ¶5; 4 Op. Eth. Bd. 71 (1980).

⁴ "Substantial" is anything more than token or inconsequential value and may be synonymous with "merchantable value". 2006 Wis Eth Bd 04, ¶10; 7 Op. Eth. Bd. 2 (1983); 5 Op. Eth. Bd. 99 (1982); 5 Op. Eth. Bd. 73 (1981).

⁵ "Private benefit" refers to an advantage for oneself. 7 Op. Eth. Bd. 13 (1983).

Even if acceptance of an item or service is of private benefit to a state official, the official may still accept an item or service if the public, rather than the official, is the primary beneficiary. 1997 Wis Eth Bd 13 ¶5. Even if there is a private benefit associated with an act, it is consistent with the Ethics Code if the private benefit is merely incidental to the public benefit. 8 Op. Eth. Bd. 50 (1985); 6 Op. Eth. Bd. 12 (1982). The test is not whether there is any personal benefit; the issue is whether the benefit conveyed is primarily a personal benefit. 2003 Wis Eth Bd 1 ¶6 citing 1996 Wis Eth Bd 15, ¶5; 1996 Wis Eth Bd 02, ¶6. In at least one instance, a legislator could participate in a charitable golf outing because the event was primarily to benefit charities, not the legislator.

appearance in the video appear to be a use of his office to obtain anything of substantial value for an organization of which he is an officer, director, or agent.

Lobbying law's application

Application to a candidate for elective office

¶9 Reduced to its elements, § 13.625, *Wisconsin Statutes*, provides, in pertinent part:

No lobbying principal
May furnish
To a candidate for elective state office
Anything of pecuniary value

AND

No candidate for elective state office
May accept
Anything of pecuniary value
From a lobbying principal.⁶

¶10 Your organization is a lobbying principal.

¶11 There is no benefit to the legislator as an elected official from his appearing in the video, apart from his candidacy for election to a government office.

¶12 "Candidate" means a "person for whom it is contemplated or desired that votes be cast at any election held within the state . . . and who either tacitly or

Application of sec. 19.45(2) turns on whether the official's act results in a private benefit for the official, regardless of the official's motives. In making a determination on this section's applicability, the Board might take into account (i) whether the private benefit is substantial when considered alone; (ii) the relative importance of the private benefit when compared either to public benefits or to all benefits conferred; or (iii) even if the private benefit is substantial whether it is separable from the public or other benefits obtained.

⁶ Section 13.625, *Wisconsin Statutes*, provides, in pertinent part:

13.625 Prohibited practices. (1) No lobbyist may:

* * *

(b) Furnish to any . . . candidate for an elective state office . . . :

3. Food, meals, beverages, money or any other thing of pecuniary value

* * *

(2) No principal may engage in the practices prohibited under sub. (1) (b)

(3) No candidate for an elective state office . . . may solicit or accept anything of pecuniary value from a lobbyist or principal

expressly consents to be so considered.”⁷ For purposes of this opinion, we will presume that the legislator about whom you have asked is a candidate.

¶13 The production and distribution of a video featuring a person in a positive light may be a substantial benefit to a candidate for election to state office. Payment of production costs can be a pecuniary benefit to a candidate either because it relieves the candidate of a cost that the candidate otherwise would pay or because it affords the candidate a powerful source of positive name recognition for which the candidate could not otherwise pay. Under the lobbying law, the fact that there may be a benefit to the public as well as to an official is irrelevant if the official is the recipient of an item or service of pecuniary value.

¶14 However, airtime’s pecuniary value to a candidate may have a temporal quality. Showing a video featuring a candidate for election during the days and weeks preceding an election has greater pecuniary value to the candidate than would a like purchase months or years before a vote at which the candidate might stand for election.⁸

¶15 The term of office to which voters elected the legislator extends to the opening days of 2011. The State of Wisconsin has not set any elections for statewide partisan offices until November 2010 – more than thirty-six months hence. Today, the pecuniary value, if any, of airtime for a public service announcement featuring a person who may then be a candidate is too remote and speculative to permit application of §13.625, *Wisconsin Statutes*.⁹

Advice

¶16 A legislator may appear in the organization’s video for employees and directors of the organization’s members on the importance of talking about how the member institutions serve members and communities but your organization should not disseminate the video proximate¹⁰ to an election in which the legislator is or is likely to be a candidate.

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⁷ Sections 11.01 (1) and 13.62 (5g), *Wisconsin Statutes*.

⁸ 2007 Wis Eth Bd 7.

⁹ The lobbying law applies equally to an elected state official as well as to a candidate for elective state office. The organization’s dissemination of the video, whose message is about the value its member institutions, is unlikely to have pecuniary value to an official, as official, who is not and is not likely to be a candidate for state office.

¹⁰ Although the contour of “proximate” is not precise, we have cautioned:
 Within the five months preceding an election for a governmental office for which an elected state official will be a candidate, an elected state official should not permit the use of his or her name or image or office in a “public service announcement”.
 “Public Service Announcements,” Ethics Board publication #245, created July 2005.